

SHAW, PITTMAN, POTTS & TROWBRIDGE

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

2300 N STREET, N.W.  
WASHINGTON, D.C. 20037-1128  
(202) 663-8000  
FACSIMILE  
(202) 663-8007

1501 FARM CREDIT DRIVE  
McLEAN, VIRGINIA 22102-5004

201 LIBERTY STREET, S.W.  
LEESBURG, VIRGINIA 22075-2721

JILL A. STERN  
(202) 663-8380

November 30, 1993

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

William F. Caton  
Acting Secretary  
Federal Communications Commission  
2025 M Street, N.W., Room 6324  
Washington, D.C. 20554

Re: PP Docket 93-253

Dear Mr. Caton:

On behalf of Ellipsat Corporation, I am transmitting herewith an original and nine copies of its reply comments in the above-referenced proceeding (Implementation of Section 309(j) of the Communications Act Competitive Bidding).

Should there be any questions concerning this matter, kindly communicate with the undersigned.

Sincerely,

  
Jill Abeshouse Stern

JAS:pad

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of:

Implementation of Section 309(j)  
of the Communications Act  
Competitive Bidding

PP Docket 93-253

REPLY COMMENTS OF ELLIPSAT CORPORATION

Ellipsat Corporation ("Ellipsat"), by its attorneys, submits reply comments with respect to the Commission's Notice of Proposed Rule Making in the above-captioned proceeding regarding implementation of competitive bidding pursuant to newly enacted Section 309(j) of the Communications Act of 1934, as amended.<sup>1/</sup>

I.  
INTRODUCTION

Ellipsat, the first company to file an application seeking authority to construct a low earth orbiting (LEO) satellite system to provide mobile voice services, has been waiting over three years for the Commission to process its application. Given its desire for expeditious Commission action, Ellipsat is understandably concerned about the Commission's proposal to subject LEO applications, like Ellipsat's, to competitive

<sup>1/</sup> Notice of Proposed Rule Making, PP Docket No. 93-253, FCC 93-455, released October 12, 1993.

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bidding. Not only would auctions be inconsistent with Congressional intent underlying the new provisions, but auctioning could discourage financing and thus delay introduction of the new services, and possibly preclude implementation altogether.

As others have pointed out, the application of auctions to essentially global systems such as the Big LEOs would end up encouraging other countries to pursue similar practices. Having in effect deferred their own national regulatory activity pending the results of the FCC's proceedings, foreign regulatory agencies may feel that their forbearance has yielded little in the way of a regulatory model for global systems and may find themselves under pressure also to use spectrum auctions as a revenue-raising device. U.S. private companies would suffer major setbacks as a consequence, with harm to U.S. telecommunications leadership and competitiveness.

II.  
THE STATUTE AND UNDERLYING CONGRESSIONAL  
INTENT CLEARLY REQUIRE THE COMMISSION  
TO AVOID AUCTIONS FOR THE BIG LEOS

The statutory language and legislative history of newly adopted Section 309(j) together clearly indicate that Congress did not intend to subject the Big LEO systems to competitive bidding. Section 309(j) generally authorizes the Commission to allocate spectrum through a process of competitive bidding if

mutually exclusive applications have been accepted for filing. That authority, however, is not without limit. The new legislation expressly requires the Commission to first meet its public interest obligation to avoid mutual exclusivity in spectrum allocation, before turning to auctions. Specifically, Section 309(j)(E) (emphasis added) provides:

Nothing in [§ 309] or in the use of competitive bidding, shall ...

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.

The legislative history of Section 309(j)(E) further demonstrates that Congress was aware of the Big LEO proceeding, and specifically cited that proceeding as a "case in point" when it directed the Commission to explore avoiding ways of mutual exclusivity prior to using auctions. In this regard, the House Report makes clear that the public interest requires the Commission to avoid mutually exclusive situations using whatever tools are "feasible and appropriate."<sup>2/</sup>

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<sup>2/</sup> The House Report emphasizes that:

The licensing process, like the allocation process, should not be influenced by the expectation of federal revenues and the Committee encourages the Commission to avoid mutually exclusive situations, as it is in the

Footnote continued on next page.

On the basis of the unequivocal statutory language and legislative history, spectrum auctions should not be used in the Big LEO proceeding. The Commission has feasible and appropriate tools for avoiding mutual exclusivity in the Big LEO proceeding. Ellipsat filed a Joint Spectrum Sharing Proposal on October 8, 1993, with TRW and Constellation, that set forth an equitable approach to accommodating all of the applicants, as did Motorola and Loral Qualcomm separately. The Commission therefore has the means to avoid mutual exclusivity in this case and should do so.

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Footnote continued from previous page.

public interest to do so. The ongoing MSS (or "Big LEO") proceeding is a case in point. The FCC has and currently uses certain tools to avoid mutually exclusive licensing situations, such as spectrum sharing arrangements and the creation of specific threshold qualifications, including service criteria. These tools should continue to be used when feasible and appropriate.

House Report No. 103-111 at 258 (emphasis added).

III.  
CONCLUSION

For the reasons set forth herein and in comments filed by other parties in this proceeding, spectrum auctions for the Big LEOs are contrary to Congressional intent and the public interest, and should not be used in the Big LEO proceeding.

Respectfully submitted,

ELLIPSAT CORPORATION

By:



Jill Abeshouse Stern

Jane M. Sullivan

Shaw, Pittman, Potts & Trowbridge

2300 N Street, N.W.

Washington, D.C. 20037

(202) 663-8000

Its Attorneys

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